Filed 1/29/19 Billings v. Wells Fargo Bank CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| FLAG BILLINGS et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>WELLS FARGO BANK, N. A. et al.,<br><br>Defendants and Respondents. | C084369<br><br>(Super. Ct. No. STKCVURP20150005275) |

Plaintiffs, Flag and Paula Billings, appeal from the trial court's dismissal of their third amended complaint without leave to amend. They challenge the trial court's rulings as to each cause of action it dismissed in addition to two causes of action dismissed without leave to amend from their second amended complaint. Defendants, Wells Fargo Bank, N.A. (Wells Fargo) and Bank of America, N.A. (Bank of America) (collectively defendants), contend the trial court properly dismissed plaintiffs' causes of action on the merits and, alternatively, those causes of action are barred by the applicable statutes of limitations. We agree with plaintiffs that they stated causes of action for negligence and unfair competition. In all other respects, we disagree. The judgment is reversed.

## FACTUAL AND PROCEDURAL BACKGROUND

### A

### *The Allegations*

Plaintiffs purchased their home in 1998 and refinanced their mortgage in 2005 with Wells Fargo. In 2009, Flag[1] lost his job and the couple depleted their savings attempting to pay their mortgage. They went to Wells Fargo multiple times in May 2010 seeking mortgage assistance. Then in July 2010, plaintiffs spoke with a Wells Fargo loan officer and were told that to be considered for loan modification, they would first have to miss mortgage payments. In reliance on that statement, plaintiffs stopped paying their mortgage.

In October 2010, a Wells Fargo agent promised plaintiffs they would be reviewed for loan modification since they had missed mortgage payments. The next month, plaintiffs applied for modification. During the resulting process, plaintiffs were told to resubmit documents multiple times. During each discussion between plaintiffs and Wells Fargo, plaintiffs made clear temporary assistance was not enough and they needed permanent mortgage assistance.

In February 2011, plaintiffs went to a loan modification fair held by Wells Fargo and spoke to a Wells Fargo agent who told them their mortgage payment would be reduced to $2,000 a month. Later that month, Wells Fargo sent plaintiffs a forbearance agreement, reducing their mortgage payment from $3,021 per month to $2,016.38 per month. A letter accompanying the agreement stated "[t]his is not a waiver of the accrued or future payments that become due, but a trial period showing you can make regular

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**1** Because plaintiffs' share a last name, we refer to them by their first names. No disrespect is intended.

monthly payments." The letter also provided, "[u]pon successful completion of the Agreement, your loan will not be contractually current. Since the installments may be less than the total amount due, you may still have outstanding payments and fees. Any outstanding payments and fees will be reviewed for a loan modification. If approved for a loan modification, based on investor guidelines, this will satisfy the remaining past due payments on your loan and we will send you a loan modification agreement. An additional payment may be required." This language also appeared in plaintiffs' forbearance agreement, which provided, "[t]he lender is under no obligation to enter into any further agreement, and this Agreement shall not constitute a waiver of the lender's right to insist upon strict performance in the future."

Plaintiffs called Wells Fargo about the forbearance agreement and were told the agreement was a " 'trial plan' " and they would be reviewed for permanent modification upon its successful completion. Plaintiffs made six monthly payments under the agreement and continued to provide Wells Fargo with all documents it requested.

In June 2011, plaintiffs' monthly mortgage statements provided the amount due had changed to $1,788.09. The next month, plaintiffs spoke with Kathryn Barnhill, an agent of Wells Fargo, as well as another agent of Wells Fargo. Both agents confirmed to plaintiffs the new payment amount was accurate and included taxes and insurance. Plaintiffs made their next six mortgage payments on time from October 2011 through March 2012. The November 2011 statement provided a list of payments to and from an escrow account associated with the loan.

In January 2012, while plaintiffs were in "modification review or permanent modification," Wells Fargo recorded a notice of default and election to sell plaintiffs' property. It also recorded an assignment of deed of trust granting all beneficial interest to Bank of America. Wells Fargo returned plaintiffs November and December 2011 mortgage payments. When plaintiffs called Wells Fargo, they were told their property had been placed into foreclosure, despite the fact they had paid their mortgage pursuant to the forbearance agreement. Although plaintiffs never received a letter denying their previous requests for loan modification, they were told to again apply for loan modification to delay foreclosure proceedings. Plaintiffs submitted an application.

Later that same month, plaintiffs again went to a loan modification fair where a Wells Fargo agent, Bonita Bolden, told them their application would be complete once they submitted two of Paula's pay stubs. They submitted the pay stubs the next day and called on a daily basis about the status of the application with no response until February 6, 2012, when they spoke with Bolden. Bolden told them that, to eventually enter loan modification, plaintiffs would first have to enter another forbearance agreement requiring payments of $3,666.20 for 12 months. Plaintiffs were told to reapply for loan modification if they could not afford the new payment amount, which they did.

In April 2012, Wells Fargo recorded a notice of trustee's sale on the property. Several times during that month, plaintiffs spoke with Awa-Rose Osobase, their home preservation specialist at Wells Fargo, who told them their loan modification application was complete and under review, and thus the foreclosure would be postponed. The next month, plaintiffs were told their property would be foreclosed upon in 24 hours if they did not list the property for short sale. The next day, plaintiffs listed their property for short sale. In June 2012, plaintiffs received a letter from Wells Fargo informing them their request for loan modification had been denied because "WELLS FARGO 'did not agree to the escrow requirement.' "

Thereafter, Wells Fargo received an offer for plaintiffs' home in the amount of $369,000 from a prequalified buyer. Wells Fargo counter offered for $389,000, which the buyers accepted. In reliance on Wells Fargo's assertion it had accepted the buyer's offer, plaintiffs moved out of their home. Because of Wells Fargo's continued delay, however, the prospective buyers backed out of the purchase in December 2012. Then, between January and August 2013, Wells Fargo continued to threaten plaintiffs with foreclosure, until it accepted an offer to buy plaintiffs' property for $369,000 from another buyer, and the property was sold.

Because of this prolonged process with Wells Fargo, plaintiffs suffered emotional distress, stress, anxiety, and depression. Specifically, Flag experienced insomnia and migraines. Plaintiffs also experienced damage to their credit scores.

Plaintiffs filed their original complaint on June 10, 2015. In the original and subsequent amended complaints they alleged Wells Fargo as servicer of their loan, acted as an agent and at the direction of Bank of America, who was the successor in interest to the promissory note. They also alleged Wells Fargo always intended to foreclose on their property and had no intention to review their loan modification application as promised. They further alleged Wells Fargo delayed the entire loan modification and short sale process for the purpose of increasing fees it could collect once the property was sold through foreclosure. Plaintiffs contend that had Wells Fargo reviewed their application, they would have been granted loan modification because they had successfully completed the trial period contemplated by the forbearance agreement. As evidence Wells Fargo never intended to grant them permanent loan modification, plaintiffs point to Wells Fargo's letter denying them such modification because it " 'did not agree to the escrow requirement.' " Plaintiffs argue this is a false reason to deny modification because no escrow requirement was ever discussed with them and they would have accepted any escrow requirement offered by Wells Fargo to stay in their home.

They further contend Wells Fargo granted them permanent loan modification when it reduced their monthly payment to $1,788.09 without requiring them to pay off the arrears following completion of the forbearance agreement. Plaintiffs alleged Wells Fargo never sent the modification documents to them and that there was no other reason for their loan payment to change but for permanent modification.

"If Plaintiffs had known WELLS FARGO would never have granted a loan modification, Plaintiffs could and would have attempted to remain current on the Subject

Loan, preventing the need to go into foreclosure or force a short sale. Plaintiffs also could have attempted to refinance the Subject Loan while their credit rating was still high enough for them to qualify for another refinance. Plaintiffs also could have attempted a short sale of the property much sooner in the process and prevented much of the damage to their credit and stress, distress, anxiety, and depression that resulted from the drawn-out modification process."

B

*The Action*

Plaintiffs' original complaint alleged eight causes of action: 1) intentional misrepresentation; 2) false promise; 3) negligent misrepresentation; 4) promissory estoppel; 5) breach of contract; 6) negligence; 7) intentional infliction of emotional distress; and 8) unlawful business activity in violation of Business and Professions Code section 17200. Following multiple demurrers and amended pleadings, the trial court dismissed without leave to amend plaintiffs' negligence and intentional infliction of emotional distress causes of action from their second amended complaint.[2] It reasoned that these causes of action failed because the law did not allow for relief in the context of the commercial loan modification process.

Plaintiffs brought their six remaining causes of action in a third amended complaint. Defendants filed a demurrer. The court sustained the demurrer in its entirety

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**2** Plaintiffs argue the dismissal without leave to amend occurred at the hearing on their first amended complaint. Defendants counter that the tentative order plaintiffs refer to was amended to allow leave to amend. We agree with defendants. The trial court's tentative order on the demurrer to plaintiffs' first amended complaint dismissed plaintiffs' negligence and intentional infliction of emotional distress claims without leave to amend. The order adopting the tentative order is not in the appellate record but plaintiffs argued these claims in their second amended complaint, which the court then dismissed without leave to amend in its ruling on that complaint.

and dismissed without leave to amend plaintiffs remaining causes of action. Plaintiffs now appeal.

## DISCUSSION

### I

### *Standard Of Review*

The purpose of a demurrer is to test whether, as a matter of law, the properly pleaded facts in the complaint state a cause of action under any legal theory. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) On appeal from a judgment dismissing the complaint after the trial court has sustained a demurrer without leave to amend, we assume the truth of all facts properly pleaded, as well as facts of which the trial court properly took judicial notice. (*Ibid*.) We do not assume the truth of contentions, deductions, or conclusions of law. (*Ibid*.) We apply a de novo standard of review. (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279.)

We review the trial court's decision denying leave to amend for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 274-275.) We determine whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Id*. at p. 274.) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid*.) Where there is no reasonable possibility that a plaintiff can cure a defect in a complaint with an amendment, an order sustaining a demurrer without leave to amend is not an abuse of discretion. (*Id*. at pp. 274-275.)

### II

### *Plaintiffs' Second Amended Complaint Did State A Cause Of Action For Negligence But Not For Intentional Infliction Of Emotional Distress*

Plaintiffs contend the trial court erred by dismissing, without leave to amend, their causes of action for negligence and intentional infliction of emotional distress from their second amended complaint.[3] We agree the trial court erred regarding plaintiffs' negligence cause of action.

A

*Negligence*

To prevail on a negligence cause of action, plaintiffs are required to plead and prove that defendants owed them a legal duty, defendants breached the duty, and the breach was a proximate or legal cause of plaintiffs' injuries. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477.) Whether a duty of care exists is a question of law to be decided on a case-by-case basis. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62.)

Plaintiffs' second amended complaint alleged Wells Fargo, as the servicer of their loan, had a duty to act reasonably during the processing of their loan modification application and that it breached that duty "by failing to review Plaintiffs for a permanent modification even after Plaintiffs had complied with all requirements to be reviewed for a loan modification numerous times." Plaintiffs also alleged Wells Fargo erroneously told them they were required to default on their mortgage before becoming eligible to apply for loan modification, which resulted in them missing mortgage payments. Plaintiffs' allegation of damages is that as a result of defendants' conduct, they "have suffered injury in that they were denied a review for a loan modification which would have resulted in a modification which would have saved Plaintiffs' home; spent time, energy

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[3] As discussed, plaintiffs argue these causes of action in regard to the court's order on its first amended complaint. Defendants mention plaintiffs may have forfeited these claims for failing to address them through the lens of their second amended complaint. They, however, acknowledge the second amended complaint contains similar allegations to the first amended complaint making the causes of action easily reviewable. Because defendants do not meaningfully argue for forfeiture of plaintiffs' appellate claims regarding negligence and intentional infliction of emotional distress, we will reach their merits.

and resources in their attempts to obtain a loan modification; experienced damage to their credit; suffered increased interest and arrears that they would not have otherwise incurred; forewent seeking other remedies and solutions; and have incurred legal fees and costs . . . .”

The trial court dismissed this cause of action citing *Lueras*. There, the court held loan modification “falls squarely within the scope of a lending institution’s conventional role as a lender of money” and thus a lender’s duty is defined by the loan documents and relevant statutes and regulations, not common law negligence principles. (*Lueras v. BAC Home Loans Servicing, LP*, *supra*, 221 Cal.App.4th at p. 67.) Since the trial court’s order, however, this court has held a lender may have a duty of care under circumstances such as these. (See *Rossetta v. CitiMortgage, Inc*. (2017) 18 Cal.App.5th, 628, 640 (*Rossetta*).)

Generally, “a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) In those cases that fall outside the “general rule,” we engage in a balancing of factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650. (*Nymark*, at p. 1098.) “[T]he test for determining whether a financial institution owes a duty of care to a borrower-client ‘ “involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant’s conduct and the injury suffered, [5] the moral blame attached to the defendant’s conduct, and [6] the policy of preventing future harm.” ’ ” (*Ibid*.)

“ ‘[[D]uty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that “duty” is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) The decisions that have established a duty on behalf of the lender or servicer in cases like this one, have found a duty, after applying the *Biakanja* factors, where the lender or servicer has undertaken to renegotiate a loan modification, but breached the duty to exercise reasonable care in processing the loan modification application.

Thus, in *Rossetta*, this court held a lender may owe a duty when it "voluntarily undertake[s] to renegotiate a loan" because "the lender usually has greater bargaining power and fewer incentives to exercise care." (*Rossetta*, *supra*, 18 Cal.App.5th at p. 640.) The significant facts in that case were that the lender refused to consider a loan modification application until the borrower was three months delinquent, and the lender directed the borrower's behavior in a way that exceeded the role of a conventional lender, including repeatedly requesting submission of the same documents and insisting the borrower submit nonexistent documents. (*Id*. at pp. 634, 641.)

Likewise *Alvarez v. BAC Home Loans Servicing, L.P*. (2014) 228 Cal.App.4th 941, 946, 949 (*Alvarez*) held that although a lender has no duty to offer, consider, or approve a loan modification, the lender has a duty to exercise reasonable care in processing the loan modification application if it agrees to consider modification of the plaintiffs' loan. "The borrower's lack of bargaining power, coupled with conflicts of interest that exist in the modern loan servicing industry, provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification." (*Id*. at p. 949.)

Also, in *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, the court determined the lender might owe a duty where the borrower was told "on many occasions" there was a " 'high probability' " the lender would modify the loan, and that as a result of these representations, the borrower was induced to borrow more to finish his construction project. Instead of agreeing to a loan modification, the lender demanded payment of the loan in full. (*Id*. at p. 881.) The plaintiff claimed the lender breached a duty to review his loan modification request in good faith. (*Id*. at p. 899.) The court agreed the lender might have a duty because of its "upbeat prediction of the availability of a loan modification" and the fact that the lender "benefited from prolonging the loan renegotiation period . . . ." (*Id*. at p. 900.)

Finally, in *Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1158-1159, the loan servicer told the borrowers they would be evaluated for a loan modification, which would be granted if all the servicer's requests were met. Modification applications were repeatedly denied on the ground the necessary documents had not been received, even though the borrowers had submitted all requested documents. (*Id*. at p. 1159.) The borrowers were told they had to be delinquent in their payments to qualify for a modification. (*Id*. at p. 1159.) The borrowers were instructed to make reduced payments, which they believed were part of a trial payment plan. (*Ibid*.) When the borrowers attempted to resume making regular payments, the servicer refused to accept them. (*Ibid*.) Based on these actions, the court, applying the *Biakanja* factors, concluded the servicer owed a duty of care with respect to the loan modification process. (*Id*. at p. 1183.)

We come to a similar conclusion when applying the *Biakanja* factors to the facts of plaintiffs' case. With respect to the first factor, the loan modification transaction was plainly intended to affect plaintiffs. Wells Fargo's decision on their application for a permanent loan modification would likely determine whether they could keep their home. (*Rossetta*, *supra*, 18 Cal.App.5th at p. 641; *Alvarez*, *supra*, 228 Cal.App.4th at p. 948.)

With respect to the second factor, the potential harm to plaintiffs was readily foreseeable. Although there was no guarantee the modification would be granted had the loan been properly reviewed, the failure to review after plaintiffs provided all necessary paperwork multiple times and complied with the terms of the forbearance agreement deprived them of the possibility of obtaining the requested relief. (*Rossetta*, *supra*, 18 Cal.App.5th at p. 641, citing *Alvarez*, *supra*, 228 Cal.App.4th at p. 948.) Further, "by making default a condition of being considered for a loan modification, [Wells Fargo] increased the likelihood [plaintiffs] would incur additional expenses of default during the lengthy loan modification process, thereby increasing the foreseeable potential harm." (*Rossetta*, *supra*, 18 Cal.App.5th at p. 641.) The same is true regarding Wells Fargo's failure to communicate with plaintiffs about the status of their application and its repeated instruction to plaintiffs to apply for loan modification. We conclude the second *Biakanja* factor weighs in favor of finding a duty of care.

With respect to the third factor, plaintiffs alleged they suffered injury in the form of damage to their credit, increased interest and arrears, and foregone opportunities to pursue unspecified other remedies. These allegations adequately establish injury at this stage of the proceedings. (See *Rossetta*, *supra*, 18 Cal.App.5th at p. 641; *Daniels v. Select Portfolio Servicing, Inc.*, *supra*, 246 Cal.App.4th at p. 1182.) We conclude the third *Biakanja* factor weighs in favor of finding a duty of care.

Like in *Rosetta*, we have difficulty evaluating the fourth factor -- the closeness of the connection between Wells Fargo's conduct and plaintiffs' injuries -- on the pleadings. On the one hand, the second amended complaint alleged plaintiffs could not afford their mortgage and went to Wells Fargo for permanent loan assistance. This suggests plaintiffs would have suffered damage to their credit and increased interest and arrears regardless of Wells Fargo's conduct. On the other hand, the second amended complaint also alleged plaintiffs were current on their mortgage payments until they learned they would not be considered for modification unless they defaulted. We do not know when plaintiffs would have defaulted if left to their own devices, and " 'it is very likely that a borrower induced to default before it becomes absolutely necessary suffers associated injuries involving increased fees and an increased possibility of losing the home.' " (*Rossetta*, *supra*, 18 Cal.App.5th at p. 642.) The complaint further alleged Wells Fargo engaged in delay tactics by instructing plaintiffs to apply for loan modification multiple times, also increasing the fees and penalties associated with plaintiffs' default; injuries that would not have occurred upon a prompt and thorough review. Construing the second amended complaint liberally, as we must, we conclude the fourth *Biakanja* factor weighs in favor of finding a duty of care. For these same reasons, we reject defendants' argument that plaintiffs have failed to adequately allege causation.

With respect to the fifth factor, we agree with the *Rossetta* and *Alvarez* courts' analyses. Although those courts were "unable to assess the lender's blameworthiness on the pleadings, the courts nevertheless found it 'highly relevant' that the borrowers' ' "ability to protect [their] own interests in the loan modification process [was] practically nil" ' and the bank held ' "all the cards." ' " (*Rossetta*, *supra*, 18 Cal.App.5th at p. 642, citing *Alvarez, supra*, 228 Cal.App.4th at p. 949.) There, as here, the borrowers were " ' "captive, with no choice of servicer, little information, and virtually no bargaining power." ' " (*Rossetta*, at p. 642.) Following *Rossetta* and *Alvarez*, we conclude the borrower's lack of bargaining power, coupled with the lender's alleged incentive to unnecessarily prolong the loan modification process, " 'provide a moral imperative that those with the controlling hand be required to exercise reasonable care in their dealings with borrowers seeking a loan modification.' " (*Ibid*.) Additionally, we note that " 'the moral blame attached to the defendant's conduct . . . is heightened when the defendant first induces a borrower to take a vulnerable position by defaulting and then subjects the borrower's loan application to a review process that does not meet the standard of ordinary care.' " (*Rossetta*, *supra*, 18 Cal.App.5th at p. 642.) Accordingly, we conclude the fifth *Biakanja* factor weighs in favor of finding a duty of care.

"Finally, with respect to the sixth factor, the legislature has enacted the California Homeowner Bill of Rights, which 'demonstrates "a rising trend to require lenders to deal reasonably with borrowers in default to try to effectuate a workable loan modification" ' and ' "expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that homes will not be lost." ' [Citations.] Imposing a duty of care in the particular circumstances of this case would serve the policies underlying these legislative preferences, and prevent future harm to borrowers, by giving lenders an incentive to handle loan modification applications in a timely and responsible manner. [Citation.] We conclude the sixth *Biakanja* factor weighs in favor of finding a duty of care." (*Rossetta*, *supra*, 18 Cal.App.5th at pp. 642-643.)

The complaint alleged Wells Fargo acted unreasonably by dragging plaintiffs through a seemingly endless application process, requiring them to submit the same documents over and over again, failing to communicate the status of various applications, requiring them to reapply for modification without denying prior applications, and ultimately denying them for a false reason. Having carefully weighed the *Biajanka* factors, we conclude these allegations adequately alleged a cause of action for negligence sufficient to survive demurrer.

Defendants urge us to reexamine *Rossetta* and instead follow the *Lueras* court's holding finding no common law duty under circumstances similar to this case. We decline to do so. We also reject defendants' argument that negligence is not a viable theory when the parties are in privity of contract. " 'Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty.' " (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865.) Although the *Biajanka* factors are often used to determine whether a contracting party will be held liable to a person or a party to the contract (see *ibid.*), *Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at page 1098, made clear these factors extend to the determination of whether a lender owes a duty of care regarding relations that exceed the scope of its conventional role as a lender of money.

We decline to revisit this holding. Accordingly, the allegations support a cause of action for negligence.[4]

B

*Intentional Infliction Of Emotional Distress*

The elements of a cause of action for intentional infliction of emotional distress are: 1) the defendant engages in extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; 2) the plaintiff suffers extreme or severe emotional distress; and 3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the plaintiff's extreme or severe emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "[T]he alleged conduct ' ". . . must be so extreme as to exceed all bounds . . . usually tolerated in a civilized community." ' " (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) Further, the requisite severe emotional distress must be such that "no reasonable [person] in civilized society should be expected to endure it" and the defendant's conduct must be " ' "intended to inflict injury or engaged in with the realization that injury will result." ' " (*Potter*, *supra*, 6 Cal.4th at pp. 1004, 1001.)

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[4] In an effort to avoid reversal, defendants argue for the first time on appeal that plaintiffs' negligence cause of action is barred by the two-year statute of limitation period reserved for those claims. (Citing Code Civ. Proc., §§ 335.1, 339.) Defendants fail to acknowledge this is the first time they raise this defense and do not provide any authority for us to reach the merits absent its assertion at the trial level. We decline to rule on defendants' asserted defense now. Plaintiffs have maintained throughout their pleadings that they seek to avail on principles of equitable tolling and delayed discovery. Defendants argue plaintiffs have alleged no facts to bring them within these exceptions. Whether the statute of limitations bars plaintiffs' cause of action or whether they may avail themselves of an exception is a question of fact. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) In this regard there are factual issues that were not developed before the trial court because of defendants' repeated failure to assert the defense. Therefore, we deem defendants' request for us to review their statute of limitations defense forfeited by their failure to raise it before the trial court. (See *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 92-93.)

We look to case law to define conduct sufficiently outrageous to satisfy that particular element of the tort of intentional infliction of emotional distress. (See, e.g., *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908-909 [bank's conduct was sufficiently outrageous where it made misrepresentations to induce plaintiffs to assign all past, present and future accounts receivable to the bank, then refused further loans and forced plaintiffs to execute excessive guarantees and security agreements, while bank employees publicly ridiculed plaintiffs, including the use of profanities]; compare *Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1002, 1009 [conduct not sufficiently outrageous where foreclosing lenders breached oral agreement to foreclose on a vacant property first where there were no allegations the lenders "threatened, insulted, abused or humiliated" the plaintiffs].)

Plaintiffs alleged defendants engaged in extreme and outrageous conduct by inducing them to apply and then leading them to believe they would be fairly considered for permanent loan modification. Despite prompt compliance with Wells Fargo's demands, plaintiffs were met with delays and denied modification based on false reasoning, resulting in the loss of their home through a short sale. Moreover, Wells Fargo promised plaintiffs their home would not be foreclosed on until the loan modification review took place. It then forced plaintiffs into listing their home for a short sale by threatening plaintiffs with a foreclosure sale to be held within a day.

The trial court rejected plaintiffs' cause of action reasoning their allegations of extreme and outrageous conduct were conclusory and the acts described merely show a commercial relationship. We agree.

Plaintiffs rely on *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, in which the plaintiff thought she was getting a fixed rate loan, but in fact got an adjustable rate mortgage. She informed the lender her signature had been forged by her loan broker. The lender instructed her not to make payments while it investigated the forgery. She followed the lender's instruction. The loan went into default and the lender foreclosed on her home. She sued alleging, among other causes of action, intentional infliction of emotional distress. The Court of Appeal reversed the trial court's grant of summary judgment in favor of the lender. The court stated that, if proven, the lender's treatment of the plaintiff was "so extreme as to exceed all bounds of decency in our society." (*Id*. at pp. 187-188, 205.)

Plaintiffs' reliance on *Ragland* is misplaced. Unlike the plaintiff in *Ragland*, plaintiffs here did not go into default solely because they followed the lender's instructions. Plaintiffs' default is attributable to multiple factors, including Flag's unexpected unemployment and resulting underemployment forcing plaintiffs to deplete their savings. Wells Fargo may have made the process of applying for loan modification difficult and stressful for plaintiffs, but plaintiffs participated in that process because they were trying to save the home they could not afford, not because Wells Fargo told them to default to fix a problem plaintiffs did not create.

Similarly, Wells Fargo's treatment of plaintiffs when listing their property for short sale did not rise to the outrageous conduct addressed in *Ragland*. Although plaintiffs listed their property in May 2012 after threat of a foreclosure sale within 24 hours, plaintiffs knew foreclosure was an option beginning in January 2012 when Wells Fargo recorded a notice of default and election to sell their property. The sale of plaintiffs' property was not unexpected or completely the fault of Wells Fargo as the case was in *Ragland*. The whole of plaintiffs' allegations show Wells Fargo treated them poorly and for the purpose of delay; this does not amount to the extreme and outrageous conduct contemplated in *Ragland*. The allegations do not support a damages award for intentional infliction of emotional distress.

Plaintiffs further contend the trial court abused its discretion by denying them leave to amend this cause of action. In making this argument, plaintiffs point to the trial court's focus on the commercial relationship between the parties as a reason for finding Wells Fargo's conduct was not extreme or outrageous. They contend they can amend their pleading to "describe precisely why [defendants'] conduct rose above the level of a mere commercial transaction," yet plaintiffs do not attempt to actually make such a showing. This omission is fatal. "To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.) Having not attempted such a showing here, plaintiffs have failed to show any abuse of discretion by the trial court.

III

*Plaintiffs' Third Amended Complaint Did Not Sufficiently Support Their Remaining Causes Of Action, Except Their Cause Of Action For Unlawful Business Activity*

Plaintiffs next contend the trial court erred in dismissing their remaining causes of action without leave to amend following defendants' demurrer to their third amended complaint. We disagree, except for their cause of action for unlawful business activity pursuant to Business and Professions Code section 17200.

A

*Intentional And Negligent Misrepresentation*

"The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. [Citations.] The essential elements of a count for negligent misrepresentation are the same except that it does not require knowledge of falsity but instead requires a misrepresentation of fact by a person who has no reasonable grounds for believing it to be true." (*Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230-231.) "Each element in a cause of action for fraud or negligent misrepresentation must be factually and specifically alleged. [Citation.] The policy of liberal construction of pleadings is not generally invoked to sustain a misrepresentation pleading defective in any material respect." (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The allegations must be sufficiently specific "to allow defendant to understand fully the nature of the charge made." (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109.)

" 'Actual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation, " 'he would not in all reasonable probability, have entered into the contract or other transaction.' " ' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) " ' "A plaintiff asserting fraud by misrepresentation is obliged to . . . ' "establish a complete causal relationship" between the alleged misrepresentations and the harm claimed to have resulted therefrom.' " [Citation.]' [Citation.] This requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499; see *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 776 [" ' "[w]hatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown" ' "].)

Plaintiffs alleged eight misrepresentations on the part of Wells Fargo: 1) in July 2010, a Wells Fargo agent told them they needed to miss mortgage payments before becoming eligible for loan modification; 2) in October 2010, a Wells Fargo agent promised them they would be reviewed for a loan modification upon submission of a completed application; 3) in February 2011, a letter from Wells Fargo promised plaintiffs they would be reviewed for a loan modification after successfully completing the forbearance agreement; 4) in August 2011, Wells Fargo agent Kathryn Barnhill and another Wells Fargo agent told plaintiffs their new monthly payment, including taxes and insurance, was $1,788.09; 5) in January 2012, a Wells Fargo agent told plaintiffs their modification application would be reviewed if plaintiffs began the loan modification process again; 6) in April 2012, Wells Fargo agent Osobase told plaintiffs on several occasions their modification application was complete and any foreclosure sale would be postponed until after the review; 7) in May 2012, a Wells Fargo agent told plaintiffs their house would be sold at foreclosure auction unless they listed the property for a short sale; and 8) in June 2012, a letter from Wells Fargo stated plaintiffs modification application was denied because plaintiffs " 'did not agree to the escrow requirement.' "

Plaintiffs alleged Wells Fargo does not require an applicant to miss mortgage payments before becoming eligible for loan modification, all of Wells Fargo's assertions that plaintiffs' application would be reviewed or that their foreclosure was postponed were false, and the stated reason for their application being denied -- that plaintiffs did not agree to an escrow requirement -- was also false. They alleged these misrepresentations "induced [them] into entering a long process of seeking a loan modification that never occurred and were forced to conduct a short sale of their family home. Additionally, due to W[ells] F[argo]'s delays in processing Plaintiffs['] loan modification applications, Plaintiffs have incurred penalties, fees and costs and negative credit reporting that otherwise would not have occurred. Ultimately, W[ells] F[argo] used the prolonged modification process as its warrant to threaten foreclosure and force Plaintiffs to short sell" their home.

Plaintiffs alleged they suffered injury "including but not limited to fees and penalties, and increased interest and arrears that they would not have otherwise incurred. . . . Plaintiffs were forced into a short sale of the Subject Property after being induced into delinquency W[ells] F[argo] used to threaten a foreclosure of the property. Plaintiffs' credit rating was damaged by W[ells] F[argo]'s actions and resulted in Plaintiffs being unable to obtain financing to purchase another property." Plaintiffs also alleged they spent time and money engaged in the modification process, as well as incurred legal fees to enforce their rights.

The trial court found these allegations insufficient because plaintiffs failed to show their reliance was reasonable or that the representations were false. Upon de novo review, we agree with the trial court that plaintiffs failed to state causes of action for intentional and negligent misrepresentation.

Initially, we note plaintiffs have failed to meet the heightened pleading requirement for their fourth alleged misrepresentation that Barnhill and another Wells Fargo agent told them their new monthly payment, including taxes and fees, was \$1,788.09. (*Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1499.) Plaintiffs did not allege this statement was false. In fact, upon a reading of the operative complaint, it is clear they believed this statement to have been true, and infer from it that they were accepted into permanent loan modification. Because plaintiffs did not allege this representation was false, it cannot sustain a cause of action for misrepresentation on either an intentional or negligent theory.

The problem with plaintiffs' remaining alleged misrepresentations is one of reliance and causation. We begin with plaintiffs' first alleged misrepresentation that they needed to miss mortgage payments to apply for loan modification. It does not appear from plaintiffs' allegations that this misrepresentation caused them to default or enter into the prolonged modification process, leading to the eventual short sale of their property as plaintiffs alleged. Over a year before applying for loan modification, Flag lost his job and was unemployed. During that time, plaintiffs depleted their savings and sought mortgage assistance because they could not afford their payment. They repeatedly told Wells Fargo they could not afford reinstatement of the loan and required modification. Yet, they argue that, had they not been told default was necessary to apply for loan modification, they would have figured out a way to remain current on their mortgage. We do not see how that is the case given plaintiffs' repeated claims they could not afford their mortgage payments without modification and their repeated requests for assistance from Wells Fargo. (*Alfaro v. Community Housing Improvement System & Planning*

*Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1381 [a party is not entitled to plead contradictory or inconsistent facts; we may accept the more specific allegation].)[5]

Plaintiffs' second, third, and fifth alleged misrepresentations all relate to Wells Fargo's assurances that plaintiffs would be reviewed for loan modification. Plaintiffs claim these misrepresentations also caused their home to be sold at short sale, caused them to accumulate unwarranted penalties, fees and costs, and caused damage to their credit. All of these damages, however, would have also been caused by a truthful assurance plaintiffs would be reviewed for loan modification. According to plaintiffs, loan modification would have resulted in nullifying their penalties and costs and damage to their credit. But because of Wells Fargo's delays and denial of their application, they were subject to outstanding penalties, resulting in bad credit and their property being sold through short sale. Thus, even by plaintiffs' own admissions, their damages were caused by the denial of loan modification not by the false promise to review them for modification. Plaintiffs did not allege Wells Fargo falsely told them they would be accepted into loan modification if they applied, or even suggested that would be the case. Accordingly, plaintiffs' reliance on an invitation to apply for loan modification to save their home and nullify the penalties and costs associated with default was unreasonable.

Plaintiffs' sixth and seventh alleged misrepresentations relate to Wells Fargo's assertions their foreclosure proceedings would be postponed upon application for

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**5** Plaintiffs, however, were not yet in default when they allege they were induced by Wells Fargo's misrepresentation that default was necessary to apply for loan modification. Thus, while the induced default cannot be said to have caused the damages plaintiffs allege, they could state a claim to the extent Wells Fargo's misrepresentation caused them to go into default before it was necessary, thus causing penalties and interest in addition to those that would have been incurred regardless. (*Rossetta*, *supra*, 18 Cal.App.5th at p. 642 [" 'it is very likely that a borrower induced to default before it becomes necessary suffers associated injuries involving increased fees and increased possibility of losing the home' "].) Unfortunately, plaintiffs did not allege this in their complaint and do not argue for amendment to their misrepresentation claims on appeal.

modification or election to short sell their property. Similar to plaintiffs' alleged misrepresentations regarding Wells Fargo's promise to review them for loan modification, there is no causal connection between these misrepresentations and plaintiffs' alleged damages. Plaintiffs alleged Wells Fargo's delay tactics of promising them a postponed foreclosure resulted in them accumulating increased penalties and fees, leading to bad credit and short sale of their home. If the foreclosure was not delayed by applying for modification or listing the property for short sale as plaintiffs alleged, then the foreclosure was always scheduled to occur given Wells Fargo had already recorded a notice of intent to sell plaintiffs' property. Plaintiffs would still have been in their home and unable to pay their mortgage, thus collecting additional penalties and damage to their credit while waiting for eventual foreclosure. In the end, plaintiffs' home would still have been sold.

Neither can plaintiffs show reasonable reliance. Plaintiffs' claim is that Wells Fargo's representation of a postponed foreclosure led to further delays in the inevitable loss of their home resulting in increased penalties and bad credit. To expect a different result than delay from a promised postponement would be unreasonable considering plaintiffs did not allege Wells Fargo misrepresented to them that the delay would have no impact on their accumulated penalties and arrears.

*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982 is instructive. In that case the defaulting borrowers alleged the bank misrepresented the date of the foreclosure sale and falsely promised the foreclosure sale would not go forward while the borrowers' loan modification application was pending. (*Id.* at pp. 1008-1009.) The court held the borrowers had failed to allege justifiable reliance and causation: "Aside from the conclusory allegation that the [borrowers] relied on the [bank's] representation regarding the date of sale, the complaint does not allege what, if anything, the [borrowers] did in reliance on the representation. Nor does it allege a causal relationship between the alleged misrepresentation and their alleged damages (the loss of their home and associated costs.) And we cannot reasonably infer that the [borrowers] could have avoided foreclosure but for the error in the notice of sale, given that the [borrowers] do not deny defaulting on their loan and do not allege that they cured, attempted to cure, or could have cured the default." (*Id.* at p. 1009; see *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308 [borrower failed to state cause of action for fraud where there was "no allegation, for example, that [the borrower] expended any money or declined other available offers in reliance on [the lender's] alleged misrepresentation," and, "[t]o the extent plaintiff was damaged, it was by the foreclosure sale itself, not by any representation about the sale being postponed"]; *Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1499 [borrowers failed to state a fraud cause of action because they did "not allege their reliance on the promised loan modifications caused them to default on their loans or prevented them from curing their existing defaults"]; *Cornejo v. Ocwen Loan Servicing, LLC* (E.D. Cal. 2015) 151 F.Supp.3d 1102, 1115-1116 [to state a cause of action for fraud, borrowers "must 'allege facts showing that [their] reliance on [the alleged] statement caused the trustee's sale of [their] home' " and that actions allegedly not taken in reliance "would have been successful in preventing the [foreclosure] sale"].) Plaintiffs' causes of action similarly fail.

Plaintiffs alleged as their eighth and final misrepresentation that Wells Fargo gave a false reason for denying their modification application. Even if the reason for denying plaintiffs' application was false, the fact remains that plaintiffs' application was denied. It was this denial that caused plaintiffs' damages of the loss of their home, bad credit, and accumulated penalties. Plaintiffs did not allege Wells Fargo misrepresented to them that it denied their application, only that the reason given for the denial was false. We accordingly reject plaintiffs' misrepresentation causes of action based on this alleged misrepresentation.[6]

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**6** Plaintiffs do not argue for amendment of these claims.

B

*False Promise*

The elements of a fraud cause of action based on a false promise are: (1) a promise by the defendant (2) made without an intent to perform and (3) made with the intent to induce reliance by the plaintiff, followed by (4) reasonable reliance by the plaintiff that results in (5) injury to the plaintiff. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) But it is not enough to allege actual reliance. A plaintiff must also allege, and ultimately prove, justifiable reliance, " ' "i.e., circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation." [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience.' " (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 794.) Although the question of whether reliance is reasonable is generally one of fact, the issue " 'may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

Plaintiffs alleged Wells Fargo falsely promised them "they would be fairly reviewed for a loan modification once they missed [mortgage] payments" and that "they would be reviewed for a permanent loan modification throughout the modification application process." Plaintiffs did not allege they were promised permanent loan modification. They contend Wells Fargo's false promises induced them into going into delinquency on their loan and applying multiple times for modification. This caused them to make payments under the forbearance agreement, accrue additional penalties and costs, waste time, damage their credit rating, and force them to short sell their home.

The trial court found these allegations insufficient because plaintiffs' reliance on Wells Fargo's promise to review them for loan modification was unreasonable to the extent they believed the promise would result in permanent loan modification. We agree.

Like plaintiffs' misrepresentation causes of action, their reliance on Wells Fargo's promises to fairly review them for loan modification to save their home and nullify outstanding penalties and costs was not justifiable because Wells Fargo never promised plaintiffs they would be granted loan modification, a necessary first step to achieving plaintiffs' goal. Plaintiffs knew they could be denied loan modification upon review and were told as much in the forbearance agreement following their initial modification application. Because plaintiffs' reliance on the fair review promise was not justified, they have failed to state a cause of action for fraud by false promise.[7]

C

*Promissory Estoppel*

"The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.' " (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901.) Promissory estoppel binds a promissor " 'when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement.' " (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1041.) A promissory estoppel cause of action substitutes reliance for the consideration normally required for an enforceable contract. (*Orcilla v. Big Sur, Inc*., *supra*, 244 Cal.App.4th at p. 1007.)

Plaintiffs' alleged promise is that Wells Fargo told them they "would be reviewed for a loan modification upon the completion of the [f]orbearance [a]greement" and "similarly promised that Plaintiffs would be reviewed for a loan modification throughout the loan modification process." They alleged they relied on this promise "by making all

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**7** Plaintiffs do not argue for amendment of this claim.

of the required payments under the trial plan and by continuing to make modified payments as instructed . . . and [by] continuing to wait for a permanent loan modification to be sent to them." They also "forewent seeking other remedies at the time that would have enabled them to cure their default and keep" their home. This reliance resulted in plaintiffs' increased penalties and fees, short sale of their home, and damaged credit rating.

The trial court found these allegations insufficient because plaintiffs' alleged promises were not false. Upon a de novo review, we agree with the trial court that plaintiffs have failed to state a cause of action.

Besides alleging a separate promise to review their modification application, plaintiffs' cause of action for promissory estoppel mirrors their false promise cause of action. And like their cause of action for false promise, plaintiffs unreasonably relied on Wells Fargo's promise to review them for loan modification to save their home and annul their arrears. Both results were only possible if plaintiffs were granted loan modification, something that was never promised by Wells Fargo and was uncertain based on an application for modification alone. Accordingly, plaintiffs have not alleged sufficient facts to sustain a cause of action for promissory estoppel.

Plaintiffs argue the trial court erred by denying them leave to amend because contrary to the court's assumption, they had only amended this cause of action twice and not three times, allowing for additional amendment under Code of Civil Procedure section 430.41, subdivision (e)(1). They argue that, had they been allowed to amend, they would demonstrate "the 'review' that purportedly took place in April through June of 2012 and resulted in a bogus denial, was not a review at all . . . ." This amendment, while responsive to the trial court's concerns, does not assist plaintiffs. The trial court dismissed plaintiffs' promissory estoppel cause of action because it found a review of plaintiffs' application had occurred. We reject the claim because, even if Wells Fargo falsely promised to review plaintiffs' loan modification application, plaintiffs' reliance on that promise to save their home and annul their arrears was unreasonable, whether that review was "bogus" as plaintiffs alleged is irrelevant. Plaintiffs have not shown they can amend their cause of action to state a claim for promissory estoppel.

D

*Breach Of Contract*

The elements of a breach of contract cause of action are: 1) the existence of the contract; 2) performance by the plaintiff or excuse for nonperformance; 3) breach by the defendant; and 4) damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.)

Plaintiffs alleged they and Wells Fargo entered into a permanent loan modification contract when Wells Fargo reduced and then accepted their monthly payments of $1,788.09. Plaintiffs acknowledge they are not in possession "of the further terms of the contract" because, although Wells Fargo drew up a document, it never sent the document to them. Plaintiffs assert Wells Fargo would produce the document during discovery. They alleged they performed under the contract by making monthly payments and Wells Fargo breached the contract by refusing to provide permanent modification documents, refusing to accept payment, instituting foreclosure proceedings, and forcing plaintiffs to short sell their home.

The trial court reject this claim because "[p]laintiffs d[id] not allege that there was a written contract as would be required under the Statute of Frauds." Upon a de novo review we agree with the trial court that plaintiffs have not stated a cause of action. Indeed, plaintiffs have failed to show the existence of a contract, regardless of whether it comports with the statute of frauds.

To form a valid and enforceable contract, it is essential that there be: 1) parties capable of contracting, 2) consent, 3) a lawful object, and 4) sufficient consideration. (Civ. Code, § 1550.) Mutual assent is accomplished when a specific offer is communicated to the offeree, and an acceptance is subsequently communicated to the offeror. (*Russell v. Union Oil Co*. (1970) 7 Cal.App.3d 110, 114.) "Under the objective test of contract formation, a 'meeting of the minds' is unnecessary. A party is bound, even if he misunderstood the terms of a contract and actually had a different, undisclosed intention." (*Blumenfeld v. R. H. Macy & Co*. (1979) 92 Cal.App.3d 38, 46.)

Here, we cannot ascertain the intention of the parties from plaintiffs' allegations. Plaintiffs alleged they spoke with Osobase and another Wells Fargo agent, both of whom told them that their new payment of $1,788.09 included taxes and insurance. Plaintiffs infer from this that they had been granted permanent loan modification. The problem with plaintiffs' argument is that permanent loan modification was never communicated to them. The most plaintiffs accepted through their payment of $1,788.09 was a reduced payment for an unspecified amount of time that included taxes and insurance. Plaintiffs were not offered, nor did they accept, permanent loan modification. There was no contract and thus plaintiffs' cause of action for breach of contract fails.[8]

### E

### *Business And Professions Code Section 17200*

Business and Professions Code section 17200 prohibits any "unlawful, unfair or fraudulent business act or practice." Because the statute is written in the disjunctive, it prohibits three separate types of unfair competition: 1) unlawful acts or practices, 2) unfair acts or practices, and 3) fraudulent acts or practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) The trial court concluded this cause of action failed because an unlawful business activity claim is derivative of plaintiffs' other causes of action and all those other causes of action were dismissed.

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**8** Plaintiffs do not argue for amendment of this claim.

Plaintiffs contend their complaint alleged a cause of action under all three prongs. Specifically, the complaint alleged defendants violated Civil Code section 1509[9] by making fraudulent statements, that defendants engaged in dual-tracking by simultaneously seeking foreclosure while allegedly processing plaintiffs' modification application, and defendants deceived them throughout the entire loan modification process.

We have already rejected plaintiffs' claims Wells Fargo made numerous misrepresentations to them and thus also reject their unfair competition cause of action on that same ground. As to the unlawful and unfair prongs, however, we agree with plaintiffs that they have stated a cause of action.

"A business practice is 'fraudulent' within the meaning of [Business and Professions Code] section 17200 if it 'likely to deceive the public. [Citations.] It may be based on representations to the public which are untrue, and " 'also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under' " the [Unfair Competition Law]. [Citations.] The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer.' " (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1380.) "A 'fraudulent activity includes any act or practice likely to deceive the public, even if no one is actually deceived." (*Jolley v. Chase Home Finance, LLC*, *supra*, 213

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**9** Civil Code section 1509 does not exist. Plaintiffs corrected this error in their appellate brief and correctly cite Civil Code section 1710 as the section defining deceit. We will consider this theory for the first time on appeal. (See *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259 [appellant may advance a new theory as to why the allegations of the complaint state a cause of action on appeal from a demurrer dismissal without leave to amend].)

Cal.App.4th at p. 907; see *Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 772 [" 'Unlike common law fraud, a Business and Professions Code section 17200 violation can be shown even without allegations of actual deception, reasonable reliance and damage' "].)

Our Supreme Court has not yet established a test for determining whether a business practice in a consumer case is "unfair." (See *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9 ["[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the [Unfair Competition Law] is currently unsettled"].) Prior to our Supreme Court's opinion in *Cel-Tech*, courts applied a balancing test to determine whether a practice was "unfair" under the Unfair Competition Law. (See, e.g., *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 969-970.) Specifically, courts would balance the impact of the practice on the alleged victim, against the reason, justification and motives of the alleged wrongdoer. (*Ibid*.) Our Supreme Court rejected this approach in *Cel-Tech*, an anticompetitive practices case, holding that a cause of action for unfair business practices must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Cel-Tech v. Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at pp. 186-187.) Although *Cel-Tech* disapproved of consumer cases applying the balancing test, the court expressly limited its holding to anticompetitive practices cases, stating: "Nothing we say relates to actions by consumers." (*Id.* at p. 187, fn. 12.) Following *Cel-Tech*, a split in authority has developed concerning the standard for consumer claims under the "unfair" prong of the Unfair Competition Law. (Compare *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 CalApp.4th 700, 718-719 [adopting the balancing test] with *Gregory v. Albertson's Inc.* (2002) 104 Cal.App.4th 845, 854 [adopting the " 'tether[ing]' " test]; see also *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403 [adopting the test for unfairness set forth in U.S.C. § 45(n)].) Another panel of this court has adopted the balancing test

(*Progressive West Ins. Co. v. Superior Court* (1999) 135 Cal.App.4th 263, 285-286) and, in the absence of any discussion of the appropriate standard by the parties, we do the same.

The complaint alleged Wells Fargo subjected plaintiffs to a fraudulent application process, stringing them along with multiple false assurances they would be reviewed for loan modification before they were denied for a reason never negotiated with them. The complaint further alleged Wells Fargo intentionally delayed the application process by demanding plaintiffs submit the same documents over and over and by instructing plaintiffs to reapply for loan modification, all in an attempt to increase arrears, penalties, and fees, resulting in an incurable default and the short sell of their home. These allegations adequately support a cause of action under the "fraudulent" and "unfair" prongs of the Unfair Competition Law. (See *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 310 [allegation that lender "pretended to engage in loan modification efforts while actually intending to foreclose" stated Unfair Competition Law cause of action under "fraudulent" and "unfair" prongs]; *Majd v. Bank of America N.A., supra,* 243 Cal.App.4th at p. 1304 [borrower sufficiently alleged violation of the Unfair Competition Law based, in part, on lender's false assertion that he failed to provide required documentation].)

Defendants argue the only remedy potentially available to plaintiffs -- restitution -- cannot be proven because Wells Fargo never took money to which it was not entitled. Specifically, defendants argue "[t]he only thing [plaintiffs] gave Wells Fargo were lower monthly mortgage payments than those [plaintiffs] were already contractually obligated to pay." At oral argument, defendants further explained that the short sale of plaintiffs' home made defendants whole and gave them nothing in addition to that which they were entitled to take. Based on the facts pled in plaintiffs' complaint, we disagree.

Plaintiffs alleged that through Wells Fargo's cumulative conduct they were subject to increased penalties and arrears that would not have resulted if not for the unfair and fraudulent delay of their loan modification review and eventual short sale. Because of Wells Fargo's conduct, Wells Fargo received these penalties and arrears, which they would not have received had Wells Fargo appropriately handled plaintiffs' loan modification application or informed them foreclosure was certain. This is sufficient at this stage of the proceedings to survive a demurrer.

Defendants' reliance on *Day* is misplaced. *Day* involved allegations that AT&T was engaged in an unfair business practice by advertising telephone calling cards without disclosing AT&T's practice of rounding up calls to the next whole minute. The billing practice itself was not deceptive or unlawful, although the advertisements were, and restitution could not be ordered because the "filed rate doctrine" insulated AT&T from any order that would in effect impose a rate other than that approved by the Federal Communications Commission. (*Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 328-329.) This led the *Day* court to "summarize, the notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." (*Id.* at p. 340.)

In *Day*, the plaintiffs had imputed knowledge of AT&T's filed rates, thus "once the cards were purchased and used, the members of the public received *exactly what they paid for*." (*Day v. AT & T Corp.*, *supra*, 63 Cal.App.4th at p. 339.) Unlike *Day*, plaintiffs alleged they did not receive what they paid for (loan modification review) and that Wells Fargo's unfair business practices resulted in the accrual of penalties and arrears that would not have accrued had Wells Fargo reviewed their loan modification application as they paid Wells Fargo to do by defaulting and entering into forbearance. Thus, while Wells Fargo was entitled to money from plaintiffs in the form of mortgage payments or penalties and arrears imposed through fair business practices, they were not entitled to penalties and arrears fraudulently or unfairly imposed. *Day* does not hold otherwise. (*Id.* at pp. 338-339 [Taken in the context of the statutory scheme, the definition suggests that Business and Professionals Code section 17203 operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice].)

We further reject defendants' contention that plaintiffs failed to allege Bank of America participated in the unfair business practices they alleged constitute their claim under Business and Professionals Code section 17200. Plaintiffs have alleged personal participation on behalf of Bank of America: "An agency relationship also existed because [Bank of America] directed and authorized W[ells] F[argo]'s conduct in connection with the Subject Loan Modification by directing W[ells] F[argo] concerning what to tell Plaintiffs." We therefore conclude the trial court erred in dismissing plaintiffs' cause of action under Business and Professionals Code section 17200.

DISPOSITION

The judgment is reversed. The order sustaining the demurrer is affirmed in part and reversed in part. The order is reversed as to the causes of action for negligence (sixth cause of action) and violation of Business and Professions Code section 17200 (eighth cause of action). In all other respects, the order is affirmed. Plaintiffs shall recover their costs. (Cal Rules of Court, rule 8.278(a)(5).)

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Renner, J.